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# In the Supreme Court of the United States

OCTOBER TERM, 1965

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No. 112

GEORGE LEVINE, PETITIONER

*v.*

UNITED STATES OF AMERICA

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No. 125

ROBERT B. ROBERTS, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

No. 230

ROBERT GRENE, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

No. 234

NORMAN GRADSKY, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals is reported at 342 F. 2d 147.

## JURISDICTION

The judgment of the court of appeals was filed on March 11, 1965. Petitions for rehearing were denied on April 9, 1965. The petition for a writ of certiorari in No. 112 was filed on May 6, 1965, and in No. 125 on May 10, 1965. In No. 230 and No. 234, the time to file petitions for writs of certiorari was extended by Mr. Justice Black to June 8, 1965, and the petitions were filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

All petitioners raise the following issues:

1. Whether the district court abused its discretion in refusing to sustain a challenge for cause or grant additional peremptory challenges.

2. Whether the district court erred in its charge to the jury.

The following additional questions are raised:

3. Whether the evidence supports the convictions on certain substantive counts of petitioners Levine (No. 112) and Roberts (No. 125).

4. Whether the district court erred in permitting testimony regarding petitioner Roberts' use of an alias, and in allowing the indictment, which mentioned the alias, to go to the jury (No. 125).

5. Whether the district court abused its discretion in denying petitioner Grene's motion for continuance (No. 230).

6. Whether petitioner Grene was denied the assistance of counsel at trial and at the court of appeals (No. 230).

7. Whether the United States Attorney suppressed evidence material to petitioner Gradsky's defense (No. 234).

## STATEMENT

After a trial by jury, petitioners and six co-defendants were convicted under a ten-count indictment in the United States District Court for the Southern District of Florida of defrauding purchasers of securities, of mail fraud, and of conspiracy, in violation of 15 U.S.C. 77q(a), 18 U.S.C. 1341, and 18 U.S.C. 371, respectively (R. 4416–4420).[1] They were given consecutive sentences on each count, as follows: Levine (No. 112)—15 months (total of 12½ years); Grene (No. 230)—18 months (total of 15 years); Gradsky—2 years (total of 20 years). Roberts (No. 125) was given one year on each count, but only four counts were affirmed by the court of appeals. The facts may be summarized as follows:

1. Petitioners and their co-defendants engaged in a scheme by which they sold corporate notes to the public, representing that such notes would pay substantial interest, and then used the funds thus invested for their own enrichment and benefit. It was for that purpose that the Credit Finance Corporation (hereinafter "C.F.C.") was organized by petitioner Norman Gradsky and incorporated under the laws of Florida on November 19, 1958 (R. 759, 768–769, 3630). Extensive television and newspaper advertis-

[1] Reference is to volumes II through XXV of the record, which are consecutively paginated. Volume I of the record is independently paginated, and will be referred to as "I R.".

ing, promising returns of 12% and 8% interest[2] was employed to induce the public to invest in C.F.C. (R. 1067, 1219, 1232, 1339–1341, 1395, 1531, 1817, 1831, 1191, 1942–1943, 2116, 2169, 2225, 2322, 2359, 2460, 2493–2496). Investors were falsely told that C.F.C. was strictly regulated by the State of Florida (R. 1397, 1454, 1820, 1833, 1950, 1962, 2339, 2496, 2565–2566) and by the Securities and Exchange Commission (R. 1917, 2135, 2709), and that it was insured (R. 1239, 1408, 1750, 1752, 1961, 2228, 2342, 2709). It was falsely represented that C.F.C. was engaged in the business of financing used cars, and real-estate development programs (R. 1070, 1118–1119, 1171–1172, 1397, 1821, 1918–1920, 1949, 2101–2103, 2124, 2150, 2170–2171, 2228, 2325–2326, 2347, 2364, 2464–2465, 2497, 2705); that it was a successful and prospering company (R. 1124, 1841, 1920, 2325–2326, 2342); and that investments with C.F.C. were as safe as those made with a bank (R. 1069–1070, 1119, 1124, 1171, 1220–1221, 1239, 1397, 2228–2229, 2326, 2579, 2709). In addition to high rates of interest, C.F.C. offered a wide variety of prizes to potential investors (R. 1076, 1122, 1127, 1152, 1163, 1180–1181, 1225, 1240, 1701, 1841–1842, 1847, 1959–1960, 2130, 2136, 2176, 2225, 2347, 2368–2369, 2500). These inducements persuaded more than 180 individuals, particularly elderly people, to invest a total of $598,496.74 with C.F.C. (R. 3439–3441).

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[2] The interest offered was lowered from 12% to 8% because of a limitation imposed by Florida law (R. 1244, 1349, 1841, 2346).

Petitioners and their co-defendants were able to maintain the confidence of the investors by making "interest" payments on schedule; the "interest" consisted of the investors' own capital, however, and not the represented earnings (R. 1090, 1125, 1155, 1223, 1245, 1356, 1419, 1447, 1452, 1754, 1824, 1871, 2179–2180, 2211, 2238, 2304, 2332, 2351, 2374, 2468, 2503, 2581, 2595).[3] Due to the precarious financial condition of the operation, many of these "interest" payment checks were late or were returned because of insufficient funds (*e.g.*, R. 1163–1168, 1224, 1447, 1452, 1525, 1754, 1848, 1953–1955, 2140, 2239, 2329–2330, 2351, 2468, 2581–2582). Eventually, the "interest" checks stopped altogether and the victims lost the principal funds they had invested (R. 1091, 1125, 1165, 1224, 1230–1245, 1357, 1825, 1850, 1924, 1955, 2180, 2212, 2239, 2304, 2333, 2352, 2374, 2470, 2503, 2583, 2595, 2712).

By deceptive transfers of property and inflation of assets (R. 3450–3475), the conspirators were able to create a false financial picture of C.F.C.'s operations, and acquire for themselves a substantial portion of the proceeds from the sale of C.F.C.'s corporate notes (R. 3447–3480, 3489–3490, 3503–3512). C.F.C.'s funds were also used to pay for automobiles,

[3] An examination of C.F.C.'s books by the Securities and Exchange Commission revealed that C.F.C. operated at a loss at all times (R. 3446); that C.F.C. had no net earnings with which to pay interest or to return principal on the investments made (R. 3480); and that the books falsely showed non-existent assets and falsely concealed liabilities (R. 3447, 3476, 3489–3490).

gifts, and home furnishings purchased by petitioner Norman Gradsky, or by the related corporations which he controlled (R. 2613–2616, 3026, 2145, 3181–3184, 3459–3460). Petitioner George Levine utilized similar techniques to siphon off over $15,000 of C.F.C.'s funds for his own use during his management of the enterprise from July 1960 until its bankruptcy in November 1960 (R. 959, 1820, 2683–2684, 3107–3111).

2. The roles of the petitioners were as follows:

(a) Norman Gradsky was the organizer and operator of the scheme until George Levine took over its management in July 1960 (R. 1395, 1919, 1959, 3458, 3630–3637).

(b) George Levine managed the operation from July 1960 until its bankruptcy, diverted funds from C.F.C. to his own use, and fraudulently induced investors to put their money into C.F.C. (R. 1163–1168, 1953–1954, 1820, 2464, 2683–2684, 3107–3111, 3396–3397, 3872–3873).

(c) Robert B. Roberts was a vice-president of C.F.C. and a salesman (R. 1390, 1407–1408, 1752, 2228, 2229). Roberts extensively misrepresented the condition and purpose of C.F.C. to numerous investors as a part of his sales technique (R. 1408, 1752, 1753, 2228, 2229).

(d) Robert Grene served as the representative of petitioner Norman Gradsky after Gradsky resigned as president of C.F.C. and transferred the C.F.C. stock to Security Guaranty Company (R. 3054–3060). Grene became president and chairman of the board

of C.F.C. and remained in that capacity until petitioner Levine took over the operation in July 1960 (R. 1394, 3054–3060). Grene was also organizer and president of Security Guaranty Company, which Norman Gradsky controlled, and through which Gradsky controlled C.F.C. (R. 3458).

## ARGUMENT

1. All petitioners claim that the district court erred in allowing a juror, Mrs. Elizabeth Lewis, to serve in view of her answers to *voir dire* questioning conducted by counsel for a co-defendant. In response to defense counsel's questioning, Mrs. Lewis stated that she would listen to both sides before making up her mind (R. 599). When counsel called her attention to the fact that petitioners and their co-defendants did not have to "say a single word in this case," she answered, "Oh! I see" (R. 600). Defense counsel asked, "You understand that the burden is upon the Government to establish their case?" and Mrs. Lewis answered, "Oh. Yes, I see what you mean" (R. 600). In response to a further question as to whether she would require the government to prove its case, Mrs. Lewis stated, "I think it should be both sides to prove it. Maybe I don't understand your question" (R. 600). Defense counsel then asked, "Then it is your view that both sides should come forward with evidence in this criminal case?" and Mrs. Lewis answered, "Well I thought that was the procedure. I never served" (R. 600). Finally defense counsel asked Mrs. Lewis whether she had a

"firm conviction" that a defendant should come forward with evidence if on trial, and she said, "I think so" (R. 601). At that point, the trial judge intervened and stated, "She doesn't know about those things" (R. 601). Petitioners and their co-defendants challenged Mrs. Lewis for cause, but the district court denied the challenge (R. 601). Having already exhausted the ten joint peremptory challenges provided for by Rule 24(b), F.R.Crim.P., the defendants unsuccessfully moved for additional peremptory challenges (R. 604).

There is no evidence in the record to indicate that Mrs. Lewis was anything but a fair and impartial juror. She knew nothing about the case prior to trial (R. 571), had not followed the newspaper accounts of the case (R. 589), and had no opinion on the merits of the case (R. 573, 579). She was not connected with the government in any capacity (R. 578), nor was she acquainted with or related to any of the petitioners or co-defendants (R. 579). She stated that she would be controlled by the law and the evidence (R. 581–582), that she understood the presumption of innocence (R. 589), and that she would listen to all of the evidence before forming an opinion (R. 590). This case was her first experience as a juror (R. 588), and it is clear that the answers about which petitioners complain reflect nothing more than her initial unfamiliarity with rules of law which were later given to the jury and thoroughly explained by the court. There is no indication that she did not fully understand and follow the court's charge in

this area, which included instructions on the presumption of innocence, the government's burden of proof, and the prohibition against drawing any adverse inference from the failure of petitioners and their co-defendants to testify (R. 4299, 4302). In the absence of evidence to the contrary, it is presumed that she did follow the court's instructions. *Delli Paoli* v. *United States,* 352 U.S. 232, 242. Jury competency is a question for the wide discretion of the trial judge, and the exercise of that discretion will not be interefered with except on a clear showing of abuse. *Lyda* v. *United States,* 321 F. 2d 788, 791 (C.A. 9); *Beck* v. *United States,*,298 F. 2d 622, 629 (C.A. 9), certiorari denied, 370 U.S. 919; *United States* v. *Sferas,* 210 F. 2d 69 (C.A. 7), certiorari denied, *sub nom. Skally* v. *United States,* 347 U.S. 935; *Holmes* v. *United States,* 134 F. 2d 125 (C.A. 8), certiorari denied, 319 U.S. 776. There was no abuse of discretion in refusing to discharge the juror merely because of her lack of familiarity with the law.

2. All petitioners assert that the district court erred in its instructions on the effect to be given to the indictment (Levine Pet. 2; Roberts Pet. 40; Grene Pet. 3; Gradsky Pet. 7). Petitioner Roberts also complains of numerous other alleged errors in the charge (Roberts Pet. 2–4, 11–35, 38–39).

The isolated remark which petitioners challenge was:

> The Grand Jury returned an indictment, and the Grand Jury, of course, its thought was unless there was an answer to it * * * they

> should be put up on trial * * * and unless they answered they should be convicted (R. 4299).

They contend that this isolated language amounts to a comment by the trial judge on the defendants' failure to take the witness stand, and an instruction that they should be convicted because they did not offer evidence. The remark is not, in our view, subject to this construction even in isolation, and it certainly could not have been so understood when considered in light of the district court's overall instructions. The court instructed the jury that the indictment was "no evidence whatever" and that it has "no probative force" since it is a "mere formal charge" (R. 4298). It went on to say that the indictment was not testimony of any kind, and then repeated that it does not have "any probative force whatsoever" (R. 4299). Further, the court instructed on the presumption of innocence (R. 4299), stated that the burden of proof is on the government (R. 4299), and specifically told the jury that it was to draw no adverse inference from the defendants' failure to take the stand (R. 4302). Plainly, there was nothing in the charge to suggest there was any obligation on petitioners or their co-defendants to take the stand, and the challenged language bore no such implication.

The complaints of petitioner Roberts have no substance when considered in relation to the whole charge. At the conclusion of the five-week trial, the district court was presented with some fifty-three written requests for instructions by the parties

(I R. 83–138, 139–189). Petitioner Roberts himself presented requests for twenty-seven instructions (I R. 146–189). They could not all be given in *ipsissimis verbis*. The district court fully and fairly charged the jury, using colloquial language to make the legal principles commonly understandable whenever possible. At the conclusion of the charge, requests for additional instructions were invited, and the instructions requested at that time were either given, or were rejected because they had already been given in one form or another (R. 4323–4325, 4327–4330, 4333–4335, 4405). This was true of the three requests for additional instructions made by petitioner Roberts (R. 4325–4330, 4405). The district court then invited further requests for instructions, but the defendants offered none (R. 4347). In light of the provisions of Rule 30, F.R. Crim. P.—which are particularly applicable in so complex a case as this one with its many requests for instructions—petitioners should not now be heard to complain that certain instructions were omitted. Read in their entirety, the instructions fully and fairly placed the case before the jury.

3. Petitioners Levine and Grene argue that they should not have been convicted on the substantive counts based on events before or after their entry and active participation in the conspiracy (Levine Pet. 2–3, 5; Grene Pet. 3–4, 8–9). Both overlook the principle that the law makes each conspirator liable for the acts of every other conspirator done in furtherance of the conspiracy, so that one who joins

a conspiracy takes it as it is and is held accountable for the prior conduct of his co-conspirators. *United States* v. *Sobell*, 314 F. 2d 314, 326–327 (C.A. 2), certiorari denied, 374 U.S. 857; *United States* v. *Sansone*, 231 F. 2d 887, 892–893 (C.A. 2), certiorari denied, 351 U.S. 987; *Bogy* v. *United States*, 96 F. 2d 734, 741 (C.A. 6), certiorari denied, 305 U.S. 608. This principle is particularly applicable when, as here, the alleged "late joiners" were central figures in and major beneficiaries of the conspiracy. For this reason, the court of appeals properly distinguished between Levin and Grene on the one hand and the salesmen-defendants on the other. Petitioner Grene also ignores the rule that a conspirator is accountable for the conduct of his co-conspirators, unless he withdraws by some affirmative act disavowing or repudiating the conspiracy. *Hyde* v. *United States*, 225 U.S. 347; *Blue* v. *United States*, 138 F. 2d 351 (C.A. 6), certiorari denied, 322 U.S. 736; *Levey* v. *United States*, 92 F. 2d 688, 691 (C.A. 9), certiorari denied, 303 U.S. 639; *Baldwin* v. *United States*, 72 F. 2d 810 (C.A. 9), certiorari denied, 295 U.S. 761.

Petitioner Levine assumed control of the operation and management of C.F.C. some time in July 1960 (R. 2683, 2684). The evidence conclusively establishes that Levine knew the condition of C.F.C. and was aware of the corporation's real function. Levine's former attorney testified that upon examining the books of C.F.C. at Levine's request after Levine assumed control of the company, he informed Levine that he could not "make heads nor tails" of an abstract

covering certain real property purportedly held by C.F.C., and that the abstract did not even indicate that C.F.C. owned the property in question (R. 967). Levine operated the company the way it had previously been run, and he extracted over $15,000 from C.F.C. for his own use (R. 1820, 2683–2684, 3107–3111). In view of these facts, the jury was amply justified in finding that Levine knowingly entered into and remained in the conspiracy as alleged, in order to defraud those who had invested in C.F.C.

Petitioner Grene became president and chairman of the board of C.F.C. when Gradsky resigned as president in April 1960 (R. 1394, 1692–1693, 1708, 2257, 3054–3060, 3458). Thereafter, Grene served as Gradsky's alter ego, so that Gradsky retained concealed control of C.F.C. (R. 1692–1693, 1698, 3458, 3633). Grene actively assisted in the creation and maintenance of a facade of financial soundness for C.F.C., as demonstrated by his submission of a financial statement to the General Services Administration in April 1960 which falsely listed as an asset $51,000 worth of real estate that C.F.C. did not own (R. 3491). Grene also supervised the work of co-defendant Hogue, a C.F.C. vice-president and division manager, who made numerous sales of C.F.C. notes to investors on false representations (R. 1119–1120, 1239, 1396–1397, 1406, 1419, 1424, 1820, 1920, 2135–2136, 2565, 3489). He was active in negotiating a contract with the Grant Advertising Company to handle publicity for both C.F.C. and the Security Guaranty Company (R. 2257–2264). There is no evi-

dence that he performed any affirmative act of withdrawal after petitioner Levine became president. The jury was, therefore, justified in finding that petitioner Grene had a continuing interest in the conspiracy and its profits until its expiration in November 1960. *United States* v. *Cohen,* 145 F. 2d 82, 90 (C.A. 2), certiorari denied, 323 U.S. 799; *Blue* v. *United States, supra,* 138 F. 2d 351, 361 (C.A. 6), certiorari denied, 322 U.S. 736.[4]

4. a. The indictment alleged that petitioner Roberts was also known as Robert Schoonmaker, and the petitioner introduced a court order indicating that his name had been legally changed from Robert B. Schoonmaker to Robert B. Roberts (R. 63–67). Mrs. Hightower, an employee of C.F.C., testified that a co-defendant, Mrs. Hogue, had told her that Roberts had purchased a hi-fi set under the name of Schoonmaker, and that he had instructed Mrs. Hogue to give a false credit reference for him in regard to the purchase (R. 1410–1411). That testimony was clearly admissible against Mrs. Hogue because it reflected upon the nature of the dealings between herself and an alleged co-conspirator, and it is not clear from the record whether it was admitted against Roberts (see R. 1413). In any event, it was a minor fragment of a long trial in which misrepresentations by Roberts to investors were clearly shown. Even assuming that it should not have been admitted, the

[4] The position of these petitioners was obviously very different from that of the defendant-salesmen whose convictions the court of appeals reversed as to counts in which they did not individually participate.

error was not prejudicial. The jury would not have been inflamed against Roberts merely because he used a former legal name in making a purchase.[5]

b. The district court did not err in sending a copy of the indictment to the jury in response to the jury's request for it. In protracted cases such as this one, involving numerous counts and multiple defendants, reference to the indictment often serves as a helpful guide for delineation of the issues the jury is called on to decide. See *United States* v. *Press*, 336 F. 2d 1003, 1016 (C.A. 2), certiorari denied, 379 U.S. 965. Petitioner Roberts' counsel stated at trial that he had no objection to the indictment going to the jury so long as an instruction was given to disregard the reference to the alias (R. 4370–4371). The district court's instruction not to consider the indictment as evidence amply covered counsel's request in that respect. See *United States* v. *Walker*, 313 F. 2d 236 (C.A. 6), certiorari denied, 374 U.S. 807.

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[5] Mrs. Hightower also testified to other statements made to her by Mrs. Hogue with respect to Norman Gradsky's use of corporate funds at the dog races and the fact that the corporation did not own land reflected in its books. The testimony was admitted subject to connection (R. 1424–1425), and no further ruling was made with respect thereto. The lack of ownership of the real estate was otherwise proved. The trial judge charged the jury that only statements in furtherance of the conspiracy were admissible against the others (R. 4405–4406). Whether or not these statements were properly deemed in furtherance of the conspiracy (see *United States* v. *Annunziato*, 293 F. 2d 373 (C.A. 2), certiorari denied, 368 U.S. 919), their admission did not prejudice Roberts—who is the only petitioner claiming that it was reversible error to admit them (see Roberts Pet. 41–42).

5. The indictment was returned in June 1961. In April 1962, trial date was set for June 11, 1962. On June 8, 1962, Grene's counsel, who had represented him as early as August 1961 (I R. 30), moved, with Grene's consent, to withdraw on the ground that Grene had not been able to pay for his legal services (I R. 54–55; R. 28–29). On the morning of trial petitioner Grene first gave notice to the court that he would need appointed counsel. An attorney was appointed to represent him, and he began doing so that afternoon with the empanelment of the jury (R. 88–89). Although the district court denied counsel's motion for a continuance, it did adjourn for four days to enable Grene's attorney to prepare for trial (I R. 70; R. 89–90, 679–681). The record reflects that Grene's appointed attorney conducted an able and thorough defense throughout the trial of the case. In view of petitioner Grene's own negligence in failing to inform the court—until the day of trial—of his financial situation and consequent need for appointed counsel, and in light of the number of other persons (co-defendants, witnesses, etc.) involved, it was clearly not an abuse of the district court's discretion to deny the motion for a continuance.

6. Petitioner Grene also asserts that he was denied the assistance of counsel, both at trial and before the court of appeals, because: (1) at trial, during brief absences of his appointed counsel, Grene was represented by attorneys for various other defendants, and (2) before the court of appeals, Grene was repre-

sented by the attorney for petitioner Gradsky and co-defendant B. J. Gradsky (Grene Pet. 2–3, 8). There is no merit to either contention.

During the trial of this case, which consumed five weeks, it was not possible for every retained or appointed attorney to be present at all times for every session of court. The trial judge allowed "stand-in" representation by other counsel for various petitioners and co-defendants during those brief periods when their own counsel were unavoidably absent. This was done with the knowledge and consent of all defendants and counsel concerned. No objection was made to the procedure at any time during the trial of the case. Speculation as to possible conflict is insufficient, under these circumstances, to establish prejudice as the result of the temporary "stand-in" representation. See *Butler* v. *United States,* 317 F. 2d 249, 259–260 (C.A. 8), certiorari denied, 375 U.S. 838.

Nor is there evidence in the record of any conflict of interest between petitioner Grene and petitioner Gradsky or co-defendant B. J. Gradsky, either at trial or before the court of appeals. The attorney for the Gradskys at trial represented the Gradskys and petitioner Grene before the court of appeals (Grene Pet. Appendix C, D). Petitioner Grene at no time expressed dissatisfaction with that counsel before the court of appeals. In view of these facts, there is no basis to petitioner Grene's present claim of error based on speculative and unsupported assertions of conflict of interest.

7. Petitioner Gradsky's contention that the district court erred in "permitting" the United States At-

torney to "suppress" the records of Security Guaranty Company (Gradsky Pet. 2, 5–8) is without substance since there was no suppression of records whatever. After the close of the government's case, the attorney who represented petitioner Grene during the trial, David S. Clark, testified that, on the day of his appointment he had asked to see "certain records of the Security Guaranty Company," and "other records" as well (R. 4052). He was allowed to inspect such records for a brief time in the rooms at the courthouse where they were being held (R. 4053, 4673–4674). An individual described by Clark as a "government agent" asked him to leave, and told him that he could see the records, or copies of them, later (R. 4055, 4674). The records of C.F.C. were present in court during the trial of the case, and were available to all defense counsel. But counsel were informed that the records of Security Guaranty Company had been taken to Jacksonville, Florida, by a postal inspector (R. 3634, 3786).[6] Mr. Clark filed a general motion to produce each document "which the Government anticipates offering into evidence" (I R. 69; R. 4677), but he did not specify the name of any particular company in the motion (I R. 69), nor did he take any other steps to require production of such

[6] The record does not specify the purpose for which the records were transported to Jacksonville, but petitioner Grene, who was a defendant in the case in which they were used in Jacksonville (*United States* v. *Grene*, S.D. Fla., 12264–Cr.–J–EC), does not claim to have been ignorant of why they were there. It is a fair inference that the other defendants also knew where they were and why they had been transported.

"documents." No motion was made at any time by any petitioner or co-defendant for production of the records of Security Guaranty Company (R. 4058, 4676), although at one point, the district court suggested that the defense subpoena such records if they desired to examine them (R. 3788). Thus, it is plain that Gradsky knew where the records were and who had them, but was not interested in getting them.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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